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IN THE
SUPREME COURT OF THE UNITED STATES

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September, 1981

No. 80-6758

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BRIAN S. MILLER
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

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ON A PETITION FOR A
WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, ERIE COUNTY

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# BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner was indicted on March 16th, 1978; charged with four counts of Murder in the Second Degree (New York Penal Law §§125.25 subd. 2 & 3) and one count of Arson in the Second Degree (New York Penal Law §150.15). Subsequently, Petitioner moved to suppress two statements made by him on the evening of his arrest. After a hearing, held pursuant to People v. Huntley, 15 NY2d 72, the trial court granted the suppression of the first statement made by Petitioner, but denied the motion

as to the second later statement. Petitioner then entered a plea of guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, to the reduced charges of Arson in the Third Degree (New York Penal Law §150.10-1) and Manslaughter in the Second Degree (New York Penal Law §125.25-1) and was sentenced on May 23rd, 1979. On appeal, the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, by Order, dated January 16th, 1981, (79 AD2d 1092), citing People v. Graham, 76 AD2d 228; unanimously affirmed Petitioner's judgment of conviction. Leave to Appeal to the Court of Appeals of the State of New York was denied on March 23rd, 1981 (___ NY2d ___).

## JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1251(3), and Rules 19(1)(a) and 22(1) of the Rules of the Supreme Court.

## QUESTIONS PRESENTED

1. Was defendant's arrest based on probable cause and did the hearing court properly rule that his second statement to the police was admissable. Does Payton v. New York, 445 U.S. 573 compel any other result or should it be given retroactive effect?

2. Was defendant denied his right to coun el?

3. Did the defendant knowingly and voluntarily waive his right to remain silent during the second statement. Were the later admissions the product of or did they bear any taint from the prior improper police conduct?

## CONSTITUTIONAL PROVISIONS

The Petitioner raises issues involving the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

## STATEMENT

(Numbers in parentheses refer to page minutes of the Huntley Hearing proceeding held on March 28 and 29, 1979.)

On December 23rd, 1977, Fire Investigators Jerome McIntee and Francis Haynes received information from three sources that the defendant had intentionally started a fire which occurred at 277 Fillmore Avenue in the City of Buffalo. During that fire, which occurred on November 12th, 1977, two people died (50-53).

That information consisted of two signed statements and a third, verbal, statement such that McIntee and Haynes knew that the defendant "... was at the scene. We knew that he had stated to three people that he did the fire, and that he did want to talk about it, and he was having trouble sleeping" (53).

According to McIntee, the defendant had been a suspect since the day of the crime, some six weeks earlier (108).

A matter of hours after obtaining the two signed statements, Haynes and McIntee went to the defendant's residence at 223 Paderewski Drive in Buffalo accompanied by Buffalo Police Homicide Detectives Suszek and Dove and Fire Investigator Joseph Marciniak (3, 70).

McIntee knocked on the door and someone answered. McIntee asked if the defendant was there and was told "No" (111). However, McIntee had information that the defendant was there; he entered the house and found the defendant, who was then arrested and handcuffed (37, 106). McIntee admitted that he might have used a complaint of a loud party as a ruse to get into the house, but couldn't recall (111). As the defendant was being

handcuffed, McIntee told him the charges were arson and murder and advised him of his rights (78, 79).

They walked outside and into an alleyway, where McIntee again advised the defendant of his rights (79). The defendant indicated that he understood each of them (80, 81).

The defendant was then put into a police car with Haynes and McIntee in order to be transported to Police Headquarters (80, 81). While McIntee was unable to recall for sure, Haynes remembered McIntee advising the defendant in the car for the third time of his rights (39, 80). The defendant was also advised of the three statements, shown the two written statements and asked if he wanted to talk. The defendant said no (38).

Ten minutes later, they arrived at Police Headquarters where the defendant was taken into a

conference room and given the inculpatory statements to read (40, 41). Fire Investigator Marciniak read the Miranda rights and waiver portion off a rights card to the defendant. While the defendant refused to sign the waiver of rights card, he did agree to talk to the officers (124).

The defendant then told the officers that he had set the fire, but that he didn't mean it, and didn't want anybody hurt (41, 83-85). According to Investigator Haynes, Marciniak again reread the rights card and asked the defendant to sign the waiver; which was once again refused (65, 74, 125).

Investigator McIntee then asked the defendant to repeat his story so that it could be tape recorded (84). At the end of the tape, and because the defendant was concerned that he would not be treated fairly, McIntee gave him a note stating that he had cooperated (85).

Throughout this interview, defendant never requested of McIntee that he wanted to see or consult with an attorney (86).

One hour after his arrest, which occurred at 6 p.m., the defendant was booked by McIntee and taken to a cell block. McIntee then left Police Headquarters after filing his reports and leaving a copy for the Homicide Squad (103, 104).*

At approximately 7:30 p.m., Dove and Suszek brought the defendant from the cell block to their office where Suszek read him his rights (6). This was the first time either had seen the defendant since his arrest. The defendant acknowledged his understanding of his rights, agreed to talk to them, but refused to sign a waiver card (8). Although he did not ask to speak to a lawyer, the defendant did request to call his brother and was allowed to do so (9). Defendant's

*Although he was unsure, McIntee conceded that he probably handed a copy of the report to either Dove or Suszek, the two homicide detectives who had accompanied him during the defendant's arrest (104, 105).

statement which took approximately an hour and a half to reduce to type-written form was taken as he was furnished coffee and cigarettes (9, 13). At approximately 9:10 - 9:20 p.m., the statement was completed, and the defendant read and agreed with everything contained therein but would not sign it without an attorney (24).

Because this was the defendant's first mention of an attorney in his presence, Suszek terminated the interview (24).

The defendant and his brother also testified at the Huntley hearing. Of significant difference to the police officers' testimony was the defendant's testimony that he told McIntee twice that he wanted an attorney; that he made a similar request to Suszsek after the statement was typed; and that he was not allowed to make any phone calls. In additon, defendant's brother,

Wayne Miller, testified that he did not receive a phone call from the defendant that night and that the police entry into the apartment was preceded by their telling him they were there on a complaint of loud music.

Much of the balance of both the defendant's and his brother's testimony was consistent with that of the police and fire investigators.

## REASONS FOR OPPOSING THE WRIT

DEFENDANT'S ARREST WAS BASED ON PROBABLE CAUSE AND HIS SECOND STATEMENT TO THE POLICE WAS PROPERLY RULED ADMISSABLE. PAYTON V. NEW YORK, 445 U.S. 573 DOES NOT COMPEL A DIFFERENT RESULT NOR SHOULD IT BE APPLIED RETROACTIVELY.

Defendant contends that his arrest was illegal, in that the police lacked probable cause, and/or they made an unauthorized and unconstitutional entry into a private residence to effectuate the arrest, and that all his statements which followed at police headquarters thereafter should be suppressed.

In response, it is respectfully submitted that the police had probable cause to effectuate the defendant's arrest and that the manner in which they accomplished the arrest was proper.

The factors relied on by Respondent are as follows:

As the record amply demonstrates, the police had the requisite probable cause to arrest the defendant. According to Investigator McIntee, the defendant had been a suspect in the arson and resultant two homicides since the day of the fire, some six weeks earlier (108). On the day of the arrest, McIntee obtained further information, in the form of two signed statements and a third, verbal, statement from three people, to the effect that the defendant "... had stated ... that he did the fire, and that he did want to talk about it, and he was having trouble sleeping" (53).

As the hearing court properly determined these circumstances fulfilled the statutory requirement of reasonable cause which must be present when a police officer makes a warrantless arrest, §140.10-1(b) CPL, because the police were:

> "... in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers." [See p. 2, Memorandum, (Armer, J.), dated April 17th, 1979.]

Turning then to the claim that the defendant's warrantless arrest was unconstitutional as an impermissible intrusion violative of his fourth amendment rights, Respondent submits that the defendant's reliance on Payton v. United States, 445 U.S. 573, is misplaced.

Unlike the case at bar, Payton dealt only with situations where the defendant had standing to invoke the right and no consent to enter had been obtained by the police. In Payton, the warrantless non consensual entries which this Court condemned occurred under circumstances where the police knocked on an apartment door, received no response, and about 30 minutes later, used crowbars to break into the apartment, only to find no one there and seize a shell casing (defendant Payton);

and in the defendant Riddick's case, the police entered the apartment after the defendant's three year son had answered the door but before Riddick had an opportunity either to object or consent; and thereafter the police seized narcotics.

Here, independent of whose -- prosecution or defense -- testimony is believed, the circumstances of the police entry were otherwise.

Francis Haynes, fire investigator, accompanied McIntee to what McIntee believed was the apartment of Wayne Miller, the defendant's brother, at 223 Paderewski Drive (107). Haynes testified that McIntee knocked on the apartment door without saying anything and a voice told them to enter (67). Although McIntee could not recall what, if anything, he said prior to the entry, his testimony was that the door was open (111). McIntee did concede, however, that he might have said something about a complaint of a loud party.

On the other hand, defense testimony indicated that the police knock on the door was followed by Wayne Miller's response "who was it?", the reply "Police", Wayne Miller's further response, "what do you want?", and the police answer that they came for a complaint of loud music (132-133). On that basis, and in his own words, Wayne Miller stated "And then I had no reason to fear them" (133).

The apartment door was then opened and the defendant observed by the police. He was arrested, handcuffed and led from the apartment without the seizure of any evidence or an attempt by the police to elicit any statements or admissions from him.

The defendant himself testified similarly concerning the circumstances of the police entry into the apartment:

> ... they said, "Police", we had nothing to worry about, and they asked if they could come in -- or they said something about a loud party, and there was no loud party. And my brother went to the door and opened it to see what they wanted, and they just came right in.
> (emphasis added; p. 141-142)

And, as was previously noted in the Statement, supra, the defendant's inculpatory admissions were not obtained until after he had been given Miranda warnings at least 4-5 times and when he was at police headquarters.

Under these circumstances, the police obtained at least an implicit, if not an explicit, consent to the entry of the brother's apartment. The defendant's seizure, albeit warrantless, was based on probable cause and was not a pretext or prelude to the seizure of any other evidence. In sum, Payton v. United States, 445 U.S. 573 is inapplicable to the case at bar.

However, and in the event this Court should disagree, it is Respondent's position that Payton should not be applied retroactively. As the record discloses, the police here were acting in good faith and in reliance upon a statute which made it unnecessary for them to secure an arrest warrant. Johnson v. New Jersey, 384 U.S. 719, 728; People v. Graham, 76 AD2d 228.

It is Respondent's further contention, assuming arguendo that the arrest was illegal, that the defendant's second set of admissions made to Suszek and Dove should not be suppressed as "fruit of the poisonous tree".

As the hearing court properly determined, there existed a "pronounced break" between the first interrogation, (those admissions were suppressed) and the second interrogation by Suszek and Dove (those admissions were admissible) such that it could not be said that the defendant was

still under the influence of the prior questioning. Wong Sun v. United States, 371 U.S. 471. Respondent submits that the same rationale should apply with respect to the arrest, assuming that it is determined to be illegal, and the admissions which Judge Armer determined were admissible. See United States v. Crews, 445 U.S. 463.

Finally, Respondent submits that an analysis of the "arrest" issue cannot be completed without regard to the harmless error doctrine. Here, the police had probable cause to effectuate the defendant's arrest. Regardless of the manner in which they accomplished the arrest, no statements were obtained until the defendant was in police custody at headquarters. Accordingly, any illegality in the arrest must be viewed as merely harmless error.

For these reasons, the hearing court properly ruled that Petitioner's second statement, made to Suszek and Dove, was admissable.

THE DEFENDANT WAS NOT DENIED
HIS RIGHT TO COUNSEL.

Defendant also contends on this petition that he was denied his right to counsel. Defendant bases this contention on his claim, as testified to during the Huntley hearing, that during the initial questioning by McIntee, Haynes and Marciniak and then, later, when he was questioned by Suszek and Dove, that he indicated his desire to consult with an attorney. Relying on People v. Cunningham, 49 NY2d 203, defendant argues that his request for an attorney should have terminated the initial questioning and precluded any further questioning until an attorney had been provided.

In response, the People maintain that the issue presented here is one of credibility -- properly to be determined by the hearing court:

Contrary to the defendant's claim that he requested a lawyer, Fire Investigators McIntee, Marciniak and Haynes all testified that the defendant never requested or asked to consult with an attorney (46, 86, 130), during the initial questioning.

Similarly, the defendant did not request to consult with an attorney during the later questioning by Suszek and Dove (9).

Indeed, after the statement was typed and Suszek asked the defendant to sign it, the defendant's response that he would not do so without a lawyer terminated the interview (24).

Hence, the hearing court had before it conflicting versions of whether or not the defendant requested an attorney and resolved this issue favorably for the People, holding that:

> "... this court does specifically find that at no time thereat did defendant request the presence or assistance of counsel."
> Memorandum, (Armer, J.), dated April 17, 1979, p. 2.

And in its reconsidered Memorandum, dated April 23rd, 1979, the court also held that the defendant "... did not indicate a desire to speak to a lawyer (citations omitted)".

On that basis, and because the hearing court was best suited to observe the credibility, demeanor and veracity of the witnesses and their testimony, the court's determination in this regard should not be set aside by this Court.

Accordingly, the defendant was not denied his right to counsel as he never requested that right from the police officers.

THE RECORD AMPLY DEMONSTRATES THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO REMAIN SILENT DURING HIS SECOND STATEMENT TO THE POLICE. THE PRIOR IMPROPER POLICE CONDUCT HAD NO AFFECT ON THESE ADMISSIONS AS THEY WERE INDEPENDENT ACTS AND THE PRODUCT OF A DETACHED, FREE AND RATIONAL CHOICE.

Prior to making admissions to Suszek and Dove, the defendant had been given Miranda warnings on at least 4-5 occasions within an approximate three hour period of time. As the trial court properly determined, Suszek and Dove removed the defendant from his cell, fully advised him of his rights again and then

> "... conscientiously honored the burdens imposed upon police by Miranda and related cases and law and made certain that he understood these rights and waived the same before proceeding."
> [(emphasis added); p. 3, Memorandum, (Armer, J.), dated April 17th, 1979.]

That determination finds support in the record through Suszek's testimony that a.) the defendant responded yes when asked if he understood his rights (11, 12); b.) the defendant said that he would talk to Suszek and Dove (16, 17); c.) the defendant did speak with them without requesting an attorney; and d.) the defendant read the statement, agreed with everything therein, but would not sign it without an attorney, at which point the interview was terminated (24).

The hearing court also determined that this was not the defendant's first contact with police; that he was unquestionably well acquainted with his Miranda rights; and that, not only was the defendant well aware of what he was doing, he was toying with his interrogators to seek advantage for himself. [See both Memorandum, (Armer, J.), dated April 17 and 23, 1979.]

On this standard, clearly, the defendant knowingly and voluntarily waived his rights.

For the same reasons, and those which were discussed previously, Judge Armer properly determined that there was a "pronounced break" between the first admissions, which were suppressed, and those made to Suszek and Dove; that the latter admissions were not the product and bore no taint from the prior improper conduct of McIntee; and that the defendant made them as an independent act and as a "detached, free and rational choice". See Wong Sun v. United States, 371 U.S. 471.

For these reasons, the admissions made to Suszek and Dove were properly ruled admissable.

## CONCLUSION

IN LIGHT OF THE FOREGOING, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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